Supreme Court, U.S.
FILED

98 494 SEP 2 2 1998

NO. _____

IN THE

Supreme Court of the United States

October Term, 1997

ERIEVIEW CARTAGE, INC.

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

BOARD OF FINANCE AND REVENUE,

Respondent.

On Petition For Writ Of Certiorari To The
Supreme Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

Lawrence A. Salibra, II
Counsel of Record
Elisa P. Pizzino
Alcan Aluminum Corporation
6060 Parkland Boulevard
Mayfield Heights Oh 44124-4185
(440) 423-6918

Attorneys for Petitioner
Erieview Cartage, Inc.

QUESTIONS PRESENTED

WHETHER THE IMPOSITION OF A PENNSYLVANIA INCOME TAX ON MOTOR CARRIERS HAVING NO PRESENCE IN PENNSYLVANIA AND OPERATING EXCLUSIVELY IN INTERESTAE COMMERCE, WHOSE TAX IS BASED ON MILES TRAVELED BY THE CARRIER WITHIN THE STATE, VIOLATES THE COMMERCE CLAUSE WHERE THE TAX;

1. OPERATES AS AN INCREASE IN THE ROAD USE TAX PLACED EXCLUSIVIELY ON INTERSTATE CARRIERS,
2. HAS NO REASONABLE RELATIONSHIP TO SERVICES PROVIDED BY THE STATE, AND
3. DISTORTS THE MANNER IN WHICH INCOME IS EARNED AND THEREBY IGNORES THE RIGHT OF A DOMICILLIARY STATE TO TAX CORPORATE INCOME EARNED IN THE DOMICILLIARY STATE.

RULE 29.6--STATEMENT

Petitioner, Erieview Cartage, Inc. is a wholly owned subsidiary of Alcan Aluminum Corporation, which itself is a wholly owned subsidiary of Alcan Aluminium Limited, a corporation organized and existing under the laws of Canada.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6--STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND THE STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT OF CERTIORARI	6
I. THIS PETITION SHOULD BE GRANTED BECAUSE THE TAX AT ISSUE CLEARLY VIOLATES THE COMMERCE CLAUSE SINCE IT CONSTITUTES HIGHER TAX FOR THE USE OF ROADS BY INTERSTATE CARRIERS THAN IS ASSESSED FOR INTRASTATE CARRIERS AND IS AN IMPROPER CONSTRUCTION OF THIS COURT'S DECISION IN *COMPLETE AUTO TRANSIT, INC., v. BRADY*, 430 U.S. 274 (1977)	6
II. THIS PETITION SHOULD BE GRANTED BECAUSE THERE IS A CONFLICT BETWEEN NUMEROUS STATE COURTS CONCERNING THE CONSTITUTIONALITY OF THIS TYPE OF TAXATION	7
III. THIS PETITION SHOULD BE GRANTED BECAUSE IT PROVIDES AN OPPORTUNTIY FOR THIS COURT TO CLARIFY THE	

ECONOMIC UNDERPINNINGS OF *COMPLETE AUTO* 11

IV. THIS PETITION SHOULD BE GRANTED BECAUSE THIS CASE IS AN EXCELLENT EXAMPLE OF THE GROWING PRACTICE AMONG STATE COURTS TRYING TO ESCAPE ACCOUNTABILITY FOR THE FAILURE TO MAKE A GOOD FAITH EFFORT TO PROTECT FEDERAL CONSTITUTIONAL RIGHTS BY ENGAGING IN PRACTICES THAT ARE DESIGNED TO DISCOURAGE REVIEW BY THIS COURT 14

CONCLUSION 17

APPENDIX:

Erieview Cartage, Inc. v Commonwealth of Pennsylvania, Board of Finance and Revenue, Order, June 25, 1998 ..... A-1

Erieview Cartage Inc., v. Department of Revenue of the State of Illinois, Order, April 24, 1996 ..... A-2

Erieview Cartage Inc., v. Commonwealth of Pennsylvania, 610 A.2d 1069 Opinion and Order, January 7, 1991 ..... A-8

Erieview Cartage, Inc. v Commonwealth of Pennsylvania, Brief on behalf of Petitioner, Erieview Cartage, Inc. A-12

Pa. Cons. Stat. §7401(3)2.(B)(1) (1971) A-19

Pa. Cons. Stat. §7402 (1971) A-18

TABLE OF AUTHORITIES

Cases

Camps Newfound/Owatonna, Inc., v. Town of Harrison, Maine, 520 U.S. 564 (1997)..... 7

Commercial Carriers v. Kentucky Tax Commission, 321 S.W.2d 42 (1959)..... 9, 10

Commonwealth of Virginia, Department of Taxation v. B. J. McAdams, 317 S.E.2d. 788 (1984) 8,9,10,11

Complete Auto Transit, Inc., v. Brady, 430 U.S. 274 (1977).....passim

Erieview Cartage, Inc. v. Commonwealth of Pennsylvania, 610 A.2d 1069 (1991)..... 4

Erieview Cartage, Inc. v. Commonwealth of Pennsylvania, 608 A.2d 492 (1992)..... 4

Erieview Cartage, Inc. v. Commonwealth of Pennsylvania, 654 A.2d 276 (1995)..... 5

Erieview Cartage, Inc. v. Commonwealth of Pennsylvania, 711 A.2d 473 (1998)..... 4,11

Erieview Cartage, Inc. v. Department of Revenue of the State of Illinois, 278 Ill. App. 3d 1123 (1996)..... 3,4,5,10,11

Roy Stone Transfer Corporation v. Messner, 103 A.2d 700 (1954)..... 10,13,14,15

South Central Bell Telephone Company, et al. v. State of Alabama and State Department of Revenue, October Term, 1997 16

Spector Motor Carrier Service, Inc. v. Tax Commissioner, 340 U.S. 602, (1951)..... 11,13

Standard Pressed Steel Co. v. Washington, 419 U.S. 560 (1975) 8

Thomas v. APSCUF, 485 A.2d 903 (1985)..... 16

Constitutional Provisions

U.S. Constitution Article. I §8, cl. 3..... 3

U. S. Constitution Amendment XIV, § 1. 2

Statutes

28 U.S.C. § 1257(a) 2

Tax Injunction Act, 28 U.S.C. § 1341 (1948). 17

Pennsylvania Corporate Net Income Tax Act, 72 P.S. §7401(3)2.(B)(1) (1971)..... 4,6

72 P.S. §7402 (1971).....

VA. CODE ANN. § 58.1-2704 (1956)..... 9

Other Authority

William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 Fla. St. U.L. Rev. 1, 11 (1986) 16

OPINIONS BELOW

For the fiscal years 1986, 1987, and 1988, the Pennsylvania Department of Revenue assessed Erieview both Franchise and Corporate Net Income Taxes. Erieview timely filed a Petition for Review with the Board of Finance and Revenue. The Board subsequently denied the petitions, by Orders that were certified and mailed on October 23, 1992.

Erieview timely appealed to the Commonwealth Court of Pennsylvania, and placed a surety bond as supersedeas with the Court pursuant to Pennsylvania Rules of Appellate Procedure 1782(a). The surety bond as supersedeas was subsequently approved. The Court approved a stipulation formally consolidating all six cases on September 11, 1995. Briefs were submitted in June 1996, and the Commonwealth Court entered judgment for the Commonwealth by Opinion and Order dated June 10, 1997. On July 9, 1997, Erieview filed Exceptions. The Exceptions were denied on July 17, 1997.

Erieview subsequently filed a Notice of Appeal to the Supreme Court of Pennsylvania contemporaneously with its Jurisdictional Statement, both of which were filed within thirty days of the Commonwealth Court's Order of July 17, 1997, in accordance with Pennsylvania Rule of Appellate procedure 903. The Supreme Court of Pennsylvania denied Erieview's appeal "Per Curiam". Petitioner now appeals that final Order dated June 25, 1998. Printed in the Appendix at A-1.

JURISDICTION

The Supreme Court of Pennsylvania entered its judgment on June 25, 1998. The Jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Commerce Clause of the united States Constitution, U.S. Const. Art I, § 8, cl. 3, provides: "The Congress shall have power.....[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The Due Process Clause of the United States Constitution, U.S. Const. amend. XIV, §1, provides: "No State shall....deprive any person of life, liberty, or property without due process of law."

Relevant portions of Pennsylvania Statutes are printed in Appendix at A-18 and A-19.

STATEMENT OF THE CASE

The Petitioner, Erieview Cartage, Inc. ("Erieview") is a Delaware Corporation, doing business in Ohio, and is a commonly controlled contract motor freight carrier that conducts interstate transportation of cargo on an irregular route basis pursuant to operating authority granted by the Interstate Commerce Commission ("ICC"). Erieview has no establishments in Pennsylvania, no employees or leased employees located in Pennsylvania, no commercial bank accounts in Pennsylvania, no

organization located in Pennsylvania conducting business on its behalf, and no contracts were executed in Pennsylvania. Erieview does not own the equipment nor does it employ the drivers. Both are leased and operate under Erieview's ICC authority. Nonetheless, Pennsylvania assesses an income tax on Erieview based on the mileage Erieview travels within the State of Pennsylvania. In addition, a number of other states ("Taxing States") through which Erieview transports freight, assess a similar income tax on Erieview. The formula Pennsylvania and the Taxing States utilize, does not distinguish between (a) pass through miles (miles run across a state with no stops for pick-ups or deliveries) and pick-up and delivery miles (a delivery is made from out of state or cargo is picked up for delivery in another state); or (b) between revenue miles (miles where cargo was hauled) and deadhead miles. The Pennsylvania Supreme Court's decision upholding this income tax on Erieview's interstate business, violates Erieview's rights under the Due Process Clause and Commerce Clause, and is what forms the basis of this Petition.

The ruling by the Supreme Court of Pennsylvania in upholding the constitutionality of the state's tax scheme is inconsistent with the holdings by courts in other states. Specifically, the ruling is in direct conflict with a recent decision in the State of Illinois where a similar tax was litigated. *See Erieview Cartage, Inc. v. Department of Revenue of the State of Illinois* ("*Erieview-Illinois*") 278 Ill. App. 3d 1123 (1996) (the unreported written opinion of the Illinois appellate court is printed in the Appendix at A-2). The Illinois Appellate Court declared pass through miles unconstitutional in violation of the Commerce Clause (U.S. Const. art. I §8, cl. 3) *See* A-6. Both Illinois and Pennsylvania identify transit companies for assessment of the corporate income tax by

essentially the same method--reference to road use tax returns filed by the companies.

In *Erieview-Illinois*, Erieview filed fuel tax returns, which was used by Illinois as a surrogate for road use taxes. In-state mileage was used to determine the fuel used in Illinois even if the fuel was not actually purchased in Illinois. Pennsylvania has similar taxes under the Pennsylvania Corporate Net Income Tax Act, 72 P.S. §7401(3)2.(B)(1) (1971) which bases it's rate on the number of miles traveled in the state.

The case that forms the basis for this Petition is the last case in a series of three cases involving different periods of taxation. *See Erieview Cartage, Inc. v. Commonwealth of Pennsylvania*, 711 A. 2d 473 (1998) ("Erieview-PA"). The first case involving tax years 1981-1983, was dismissed because the Pennsylvania Commonwealth Court, after hearing oral argument, concluded that the brief of Erieview did not conform to the rules of the Court with respect to the headings set out in the brief. *See Erieview Cartage, Inc. v. Commonwealth of Pennsylvania*, 610 A.2d 1069 (1991). Printed in Appendix at A-8. *See also Brief of Petitioner, Erieview Cartage, Inc.* Printed in Appendix at A-12.[1] There was no suggestion that the brief was substantively deficient, precluding the court from the proper review of the constitutional challenge. The Pennsylvania Supreme Court, which had the right of "de novo" review, refused to exercise it and simply affirmed the Commonwealth Court. *See Eriview Cartage Inc., v. Commonwealth of Pennsylvania*, 608 A.2d 492 (1992).

---

[1] An almost identical brief was used in Illinois, without objection, when Erieview successfully challenged the tax there.

The second case involving tax years 1983-1985, was also heard by the Pennsylvania Commonwealth Court which held that the tax was constitutional. *See Erieview Cartage Inc., v. Commonwealth of Pennsylvania*, 654 A.2d 276 (1995). However, appeal of that ruling to the Pennsylvania Supreme Court was denied because Erieview's local Pennsylvania counsel inadvertently failed to file exceptions in a timely manner and was denied leave to file out of time. Nonetheless, the appeal itself was filed in a timely manner, yet the Pennsylvania Supreme Court again dismissed Erieview's appeal on procedural grounds.

Erieview then filed the third case involving tax years 1986-1988 with the Commonwealth Court, which forms the basis of this Petition. Because of the procedural problems it faced in Pennsylvania, apparently aimed at obstructing Erieview's constitutional challenge, Erieview pursued the Erieview-Illinois case at about the same time. *See Erieview-Illinois, supra.* While the Pennsylvania case was pending, Erieview received a favorable decision before the Illinois Appellate Court. The court ruled that a tax on pass through miles was unconstitutional. *See A-6.* The Illinois Appellate Court declined to rule on the pick-up and delivery mile issue asserting the matter was not properly raised before it.

Erieview promptly moved to have the Pennsylvania Commonwealth Court reconsider its decision in light of the ruling in *Erieview-Illinois* declaring that imposing a tax based on pass through miles is unconstitutional. The Commonwealth Court would not reconsider the ruling. Erieview filed a timely appeal before the Pennsylvania Supreme Court who declined our invitation to reconcile the inconsistency between the holding of the

Commonwealth Court and that of the Illinois court. Instead, they affirmed the holding of the Commonwealth Court without oral argument and without opinion. *See* A-1. Erieview is seeking a writ of certiorari from that ruling.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THIS PETITION SHOULD BE GRANTED BECAUSE THE TAX AT ISSUE CLEARLY VIOLATES THE COMMERCE CLAUSE SINCE IT CONSTITUTES HIGHER TAX FOR THE USE OF ROADS BY INTERSTATE CARRIERS THAN IS ASSESSED FOR INTRASTATE CARRIERS AND IS AN IMPROPER CONSTRUCTION OF THIS COURT'S DECISION IN *COMPLETE AUTO TRANSIT, INC., V. BRADY*, 430 U.S. 274, (1977).

The tax at issue is described by the State of Pennsylvania as an income tax. *See* 72 P.S. §7401(3)2.(B)(1). The tax is computed by means of a formula that allocates to Pennsylvania a percentage of a carrier's total income, which is the percentage of miles traveled in Pennsylvania versus the entire miles traveled. In other words, if 10% of Erieview's total miles traveled in a year were traveled in Pennsylvania, then Pennsylvania would impose an income tax on 10% of Erieview's net corporate income. The formula does not take into account any income producing activity contributed by the corporate activities of Erieview such as sales and marketing, dispatching, leasing safety, *inter alia*. For example, assume all of Erieview's corporate operations are conducted in state A, but all of its miles are run in states B and C. Under Pennsylvania's taxing formula, 100% of Erieview's income is attributable to states B and C.

No value is assigned to any of the necessary corporate activities. In fact, the formula operates just like a road use tax and not like an income tax. The fact that the formula totally disregards corporate operations, and the fact that the tax formula is based only on mileage, establishes that the tax relates exclusively to the use of the roads.

In addition, when responding to the question as to what services were provided by the Commonwealth that justified the tax, the Commonwealth routinely described the use of the road and its attendant services. The State of Pennsylvania provided no other services to Erieview.

This Court recently recognized that the manner in which a tax is labeled cannot defeat a federal constitutional challenge when the effect of the tax is unconstitutional, *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564 (1997). This tax is precisely such a tax. The formula Pennsylvania uses, and its justification for the tax, is exactly the same rationale used to impose a road tax. By paying, in effect, two road taxes, one directly and the other transparently disguised as an income tax, Pennsylvania is imposing a higher effective road tax rate on interstate carriers than on intrastate carriers who are not exposed to this double income taxation. This places an unconstitutional burden on interstate commerce.

II. THIS PETITION SHOULD BE GRANTED BECAUSE THERE IS A CONFLICT BETWEEN NUMEROUS STATE COURTS CONCERNING THE CONSTITUTIONALITY OF THIS TYPE OF TAXATION

The use of income tax based on the miles a

carrier travels in a state has proliferated. A number of appellate courts have addressed this issue and have reached conflicting conclusions concerning the tax's constitutionality which can only be resolved by a ruling of this Court. One court to address the constitutionality of this type of tax was the Virginia Supreme Court in *Commonwealth of Virginia, Department of Taxation v. B. J. McAdams*, 317 S.E.2d 788 (1984). *McAdams* involved a tax similar to this case which assessed a corporate income tax on carriers based on the miles traveled in the state. The Virginia statutory scheme includes a de minimis provision which precluded the assessment where activity in the state was minimal. Like Erieview, McAdams was an irregular route carrier, that only operated in interstate commerce. Except for the use of the Virginia roads, McAdams had no operations or property in Virginia, nor did it execute contracts in Virginia. It is distinguishable from Erieview in that only a very small percentage of its miles in Virginia involved pick-up or deliveries. *Id.* at 790.

The trial court held that McAdams' contact with the state of Virginia was "de minimis" and the tax did not apply. *Id.* The Virginia Supreme Court reversed. It reasoned that the fact that the bulk of the miles were pass through (or bridge miles) was irrelevant. Citing to this Court's opinion in *Standard Pressed Steel Co. v. Washington*, 419 U.S. 560 (1975), it concluded that it did not have "to quantify the value of the services provided by the taxing state." *Id.* at 788. Avoiding a meaningful analysis, the *McAdams* court concluded that "the taxpayer's use of the Virginia Highway System, enjoyment of police protection, and like benefits are sufficient to furnish the requisite nexus for taxation." *McAdams*, 317 S.E. 2d at 792. Although the *McAdams* court claims it is

complying with this Court's holding in *Complete Auto*, it did not undertake any analysis which even purports to demonstrate that the tax is "fairly related to the services being rendered by the state." *Id.*

The record in *McAdams* is unclear as to whether there was a highway use tax in the state at the time[2], but other states that have had such taxes recognized that highway use tax schemes are the appropriate mechanisms to generate revenue related to the use of highways. The State of Kentucky is one example. In *Commercial Carriers v. Kentucky Tax Commission*, 321 S.W.2d 42 (1959), the appellate court concluded that an income tax imposed by Kentucky on an irregular route carrier operating in interstate commerce was unconstitutional and that such a tax could not be justified by the use of the roads. The court explained in this respect:

> It may be well to point out that the highway usage tax or weight tax KRS 281.810, was paid by Commercial and is not involved here. To that extent, Commercial is paying its way for its interstate business.

Id. at 43.

Commercial and *McAdams* are in direct conflict. In *Commercial*, the court performed an analysis similar to the analysis performed by this Court in *Complete Auto*, although the case predated *Complete Auto*. *Commercial* pointed out that you could only tax

---

[2] There was, however, a fuel tax in existence at the time. *See* VA. CODE ANN. §58.1-2704 (1956)(1984)

interstate commerce if there was some intrastate activity that would justify the tax:

> Here there is *no local activity* which supplies the basis for justifying the tax as an indirect burden on interstate commerce. In fact, this tax falls as directly on interstate commerce as it possibly could fall; there is nothing else here for it to fall on.

Id. at 44 (emphasis supplied).

Erieview recently raised precisely the same issue in the State of Illinois as that addressed by *Commercial* and *McAdams*. In *Erieview-Illinois*, the court recognized that no other service was provided to Erieview other than the use of the roads. A-7. It also acknowledged that the state of domicile had the right to tax all of the corporate activity giving rise to corporate income. *Id.* The Illinois court concluded that the Illinois taxing scheme simply ignored the right of a domiciliary to tax corporate income with respect to the pass through miles, the only aspect of the tax on which it conducted a constitutional analysis. *Id.*

Having reviewed the holdings of several state courts, the Petitioner can identify four conflicting theories the states are utilizing to determine whether the tax on interstate carriers is appropriate or an unconstitutional burden on interstate commerce. The first theory is that mileage based on bridge or pick-up/delivery miles cannot be taxed because there is no justification to tax income because the carrier is already paying its way via a road tax. *See Commercial and Roy Stone Transfer Corporation v. Messner,* 103

A.2d 700 (1954). The second theory is that you cannot assess an income tax based on pass through miles because you are not accounting for the right of a domiciliary state to tax corporate income where that income is generated from central corporate operations. *See Erieview-Illinois.* The third theory is that you can tax everything, including bridge miles, because once you have contact with the state, no analysis is required to insure the tax is fairly related to the services provided by the state. *See McAdams.* The fourth theory, adopted by the Commonwealth in this case and similar to the result in *McAdams,* is that *Complete Auto* permits transient interstate traffic to be taxed as a domiciliary of the taxing state. *See Erieview-PA.*

The existence of these four conflicting theories concerning the proper application of *Complete Auto* requires that this Honorable Court grant this Writ so that conflicting views can be eliminated and consistent application of the Commerce Clause can be established.

III. THIS PETITION SHOULD BE GRANTED BECAUSE IT PROVIDES AN OPPORTUNTIY FOR THIS COURT TO CLARIFY THE ECONOMIC UNDERPINNINGS OF *COMPLETE AUTO.*

Prior to this Court's holding in *Complete Auto,* which reversed *Spector Motor Service, Inc. v. Tax Commissioner,* 340 U.S. 602 (1951) there was an artificial protection of interstate activities from legitimate taxation by states. Any connection with an interstate movement gave rise to immunity from state taxation regardless of the nature of the connection with the state and the extent to which the state

provided services. However, some state courts have construed *Complete Auto* not as an economic rationalization of the Commerce Clause, but as an elimination of any restrictions on the state's ability to tax.

This Court's opinion in *Complete Auto* did not describe the factual context from which the analytical paradigm it promulgated evolved. That perhaps in part accounts for the widely divergent views by state courts as to its proper application. What we do know, however, is that in *Complete Auto,* the motor trucking company was domiciled in Mississippi. It operated only in intrastate commerce and transported automobiles under intrastate operating authority from a pick-up point in Mississippi to a delivery point in the same state. *Complete Auto,* 430 U.S. at 276. The trucking company sought to insulate the income of that movement from taxation by pointing out that the automobiles it was carrying to dealerships were part of an interstate movement, having been delivered to the pick-up point in the state by a rail carrier from an out of state destination. *Id.* However, the movement of the trucking company was solely intrastate and all its corporate operations were located in Mississippi. *Id.*

For state courts to treat the type of intrastate movement in *Complete Auto* as the economic equivalent to "bridge" or pass through movement conducted exclusively in interstate commerce (or even an interstate pick up or interstate delivery) strains credulity. Yet, it is clear that some courts have avoided an analysis of the economic substance by utilizing semantic manipulation. An excellent example of the degree to which state courts have avoided making sound economic distinctions can be seen by looking at the conflicting decisions as this case went up through the Pennsylvania courts.

Prior to this Court's decision in *Complete Auto*, the Pennsylvania Supreme Court faced the constitutionality of precisely the same tax in *Roy Stone*. Although this Court in *Spector* certainly would have supported striking down the tax, it was not the application of *Spector* that was the cornerstone of the Pennsylvania Supreme Court's logic in *Roy Stone* that led it to declare the income tax unconstitutional. Rather, it was the recognition that if this tax were not unconstitutional the Commerce Clause would be rendered essentially meaningless. There was simply no rational economic justification for the tax, but rather a bald attempt to assess an improper tax on interstate commerce:

> If Pennsylvania can levy this tax on this appellant, which has no tangible or intangible property in Pennsylvania, no office in Pennsylvania, no employees doing any kind of work in Pennsylvania except driving its trucks in interstate commerce, and which makes no contracts and receives no orders in Pennsylvania, it is almost impossible to envision what is left of and what is encompassed by "interstate commerce" which a State is prohibited from taxing. If as the Commonwealth contends, this Act does not tax interstate commerce, can there be in this particular field any such thing as interstate commerce which is free from state taxation.

Roy Stone, 103 A.2d at 708.

Erieview presented the Pennsylvania Supreme

Court with this conundrum, trying to explain how the lower court in Pennsylvania reached a result totally inconsistent with the result in *Roy Stone*. If the Supreme Court of Pennsylvania had addressed this issue, it would be forced to acknowledge that it had no rational economic explanation for assessing a tax on Erieview's income for the use of its roads, or to come up with a plausible alternative economic justification for the tax. We believe it was the complete impossibility to offer a plausible alternative economic justification for the tax that motivated the Pennsylvania Supreme Court affirm *"per curiam"*, thereby avoiding the embarrassment of having to confront the contradiction, and hopefully avoid judicial accountability via appellate review by this Court.

Given the contradictions among the states in interpreting *Complete Auto* as applied to this tax, realistically a truck can travel less than 1000 miles across the United States, and in the process not only face extreme interpretations of the commerce clause on essentially the same tax, but permutations in between these extremes. This state of affairs should not exist, need not exist, and should not be permitted to continue to exist. By taking this case, this Court can articulate an economically plausible application of the principles of *Complete Auto*, insure fair and equitable treatment of both states and those engaged in interstate commerce, and restore predictability to an important constitutional element of our economy.

IV. THIS PETITION SHOULD BE GRANTED BECAUSE THIS CASE IS AN EXCELLENT EXAMPLE OF THE GROWING PRACTICE AMONG STATE COURTS TRYING TO ESCAPE ACCOUNTABILITY FOR THE FAILURE TO MAKE A GOOD FAITH EFFORT TO PROTECT

FEDERAL CONSTITUTIONAL RIGHTS BY ENGAGING IN PRACTICES THAT ARE DESIGNED TO DISCOURAGE REVIEW BY THIS COURT.

The previous section described the failure of the Pennsylvania Supreme Court to offer an explanation as to how the tax affirmed by the Commonwealth Court, is not inconsistent with its rationale for holding the tax unconstitutional in *Roy Stone*. The notion that the inconsistency is a result of this Court's intervening holding in *Complete Auto* is not plausible in light of the fact the Illinois Court of Appeals relied on *Complete* Auto to reach a contrary result.

The procedural history of this case supports the notion that practice by this Court in not promptly reviewing cases which are incorrectly resolved, has encouraged state courts to be less than enthusiastic in protecting federal rights. To finally get an appealable decision on constitutional issues in this case, Erieview had to file and pursue three separate lawsuits involving different tax years before the Pennsylvania Courts could no longer conjure up a procedural reason to dismiss the case in a manner that foreclosed appeal to this Court. Procedural obstacles appeared insurmountable regardless of whether the particular procedural issue was being handled by Erieview's trial counsel or highly skilled local counsel.

The nature of the procedural violations often verged on the incredible. One involved the failure to use the appropriate headings on the brief, although no party including the court suggested the brief was unclear or incomplete since oral argument on the merits proceeded without any apparent confusion by

the judges. Second, the fact that a corrected brief was immediately filed once the issue was raised was unsatisfactory to resolve the problem. Moreover, in the only recorded case where a similar issue was raised about a brief, the court proceeded to reach the merits since the issue was clear on what was submitted. *Thomas v. APSCUF*, 485 A.2d 903 (1985).

Similar procedural anomalies were recently disclosed in the Petition for Writ of Certiorari By South Central Bell Telephone Company *(South Central Bell Telephone Company, et al. v. State of Alabama and State Department of Revenue*, October Term, 1997), which occurred in the Alabama Courts. The practice is widely recognized by the experienced trial bar and not necessarily confined to state courts. There is a widespread perception acknowledged by members of this Court[3] that this Court's propensity to emphasize the academic character of its constitutional responsibilities, all at the expense of having an efficient and predictable legal system, is a matter of serious concern, and to a large measure responsible for indirectly encouraging the conduct by the state courts illustrated in this case and *Southern Bell.*

---

[3] If we were talking about laboratory cultures or seedlings, the concept of issues "percolating" in the courts of appeals for many years before they are really ready to be decided by the Supreme Court might make some sense. But it makes very little sense in the legal world in which we live. It is of little solace to a litigant who lost years ago in a court of appeals to learn that his case was part of the "percolation" process which ultimately allowed the Supreme Court to vindicate his position.

William H. Rehnquist, "The Changing Role of the Supreme Court" 14 Fla. St. U.L. Rev. 1, 11 (1986).

In addition, in this area in particular, appellate vigilance is most important because of the restricted access by an injured party to the federal court system for the vindication of federal rights. *See* Tax Injunction Act, 28 U.S.C. § 1341 (1948). It is simply naive to under estimate the reality of the pressures of judicial employment, particularly in state courts. The former Chief Judge of the West Virginia Supreme Court was blunt about the pressure on the state judiciary:

[t]he way in which state court judges get their jobs has a major impact on the outcome of lawsuits.

CONCLUSION

This case raises crucial issues of accountability, consistency and predictability that deserve and require the attention of this Court. For all the foregoing reasons, Petitioner Alcan Aluminum Corporation respectfully requests that this Honorable Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

Lawrence A. Salibra, II
Elisa P. Pizzino
Alcan Aluminum Corporation
6060 Parkland Boulevard
Mayfield Heights OH 44124-4185
(440)423-6918

Attorneys for petitioner
Erieview Cartage, Inc.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

ERIEVIEW CARTAGE, INC., Appellant	: Nos. 106-111 M.D. Appeal Docket 1997
v.	: Appeal from the Order of the Commonwealth Court of Pennsylvania
COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE AND REVENUE, Appellee	: June 10, 1997, at No. 442 F.R. 1992
	: Petition for Admission Pro Hac Vice

ORDER

PER CURIAM **DECIDED: JUNE 25,1998**

AND NOW, this 25th day of June, 1998, the Order of the Commonwealth Court is affirmed. The Petition for Admission Pro Hac Vice is granted.

JUDGMENT ENTERED:
JUNE 26, 1998

s/_____
CHARLES W. JOHNS
PROTHONOTARY

THIRD DIVISION

April 24, 1996

No. 1-93-2565

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

ERIEVIEW CARTAGE, INC.	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County-
	)	
	)	No- 91-L-50879
	)	
	)	
DEPARTMENT OF REVENUE	)	
OF THE STATE OF ILLINOIS	)	Honorable
	)	Randye A. Kogan,
	)	Judge Presiding.
Defendant-Appellee.	)	

ORDER

Plaintiff, Erieview Cartage, Inc., brought this action in the circuit court of Cook County against the Illinois Department or Revenue (hereinafter the Department) pursuant to the Administrative Review Act (735 ILCS 5/3-101 et seq. (West 1992)) seeking review of a decision by an administrative law judge

(hereinafter ALJ) affirming a determination by the Department that it did not file the required Illinois Income tax returns. for the period 1979 through 1984. It is from the circuit court's order affirming the Department's decision that plaintiff now appeals to this court pursuant to Supreme Court Rule 301 (155 Ill. 2d R- 301).

For the reasons which follow, we affirm in part and reverse in part and remand with directions.

In an administrative review action, the findings and conclusions of an administrative agency are prima facie true (735 ILCS 513-110 (West 1992)) and will not be disturbed in a review unless they are against the manifest weight of the evidence. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203, 213 (1991).

Plaintiff argues that it is not subject to taxation under section 201 of the Illinois Income Tax Act (35 ILCS 5/201(a) (West 1992)) and that the imposition of such a tax would violate the Commerce Clause (U.S. Const., art. I, § 8) and the Due Process Clause (U.S. Const., amend. XIV) of the United States Constitution. Specifically, plaintiff contends that because it is not a resident of Illinois and all of its activities take place outside of Illinois, it neither received nor earned income in Illinois on which it could be taxed. Moreover, plaintiff asserts that it has an inadequate nexus with the State and, therefore, such a tax would place an impermissible burden on interstate commerce.

The United States Supreme Court has held that a State tax on an interstate transaction will withstand a Commerce Clause challenge only if the tax: (1) is applied to an activity having a substantial nexus with

the taxing State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State. Complete Auto Transit v- Brady, 430 U.S. 2741 51 L. Ed. 2d 326, 97 S. Ct. 1076 (3977). Moreover, the Due Process Clause requires some definite link or minimum connection between the State, Find the person, property or transaction which it seeks to tax Quill Corp. v. North Dakota ex rel. Heitkam, 504 U.S. 298, 119 L. Ed 2d 91, 112 S. Ct 1904 (1992) .

The stipulated facts in this case indicate that, during the tax period in question, plaintiff transported property: (i) out of Illinois, from points-of origin within Illinois (hereinafter pick-ups); (2) into Illinois, from points-of-origin outside of Illinois (hereinafter deliveries); and (3) through Illinois, from points-of-origin outside of Illinois to points-of-destination outside of Illinois. We will first consider plaintiff's status as a result of its, pick-ups and deliveries within Illinois. The facts indicate that plaintiff's total number of pick-ups and deliveries in Illinois amounted to: 1,271 from April through December 1982, 595 in 1983, and 538 in 1984. During this period, such pick-ups and deliveries were made by trucks under the exclusive possession and control of plaintiff. In addition, the stipulated facts indicate that, during the period in question, plaintiff's Illinois mileage represented between 1.4% and 4.4% of Its total mileage. We agree with the circuit court and find that plaintiff had a sufficient nexus with Illinois, as a result of its pick-ups and/or deliveries within the state, to satisfy the requirements of both the Commerce Clause and the Due Process Clause.

As to the remaining 3 factors set forth in Complete Auto Transit, plaintiff fails to adequately challenge the tax, as applied to pick-ups and/or

deliveries. In its briefs, plaintiff makes no argument that the tax is not fairly apportioned, but rather, merely suggests that plaintiff conducts no activities in Illinois. Moreover, plaintiff makes no assertion that subjecting it to a tax based upon its pick-ups and/or deliveries would discriminate against interstate commerce. Instead, plaintiff's argument that the tax imposes an unfair burden on interstate commerce was confined to the portion of the tax that related to situations where plaintiff was merely passing through the State. Finally, plaintiff contends it has compensated Illinois for services provided to road carriers through Illinois' special fuel tax, and, therefore, an income tax would not be fairly related to services provided by the State. However, plaintiff fails to sufficiently present this argument and cites only one case from another jurisdiction in support of this view.

It is well-settled that a point raised but not argued or supported by citation to relevant authority fails to meet the requisites of Supreme Court Rule 341 (e) (7) (134 Ill. 2d R. 341 (e) (7)) and is, thus, deemed waived. Brown v. Tenney, 125 Ill. 2d. 348, 362 (1988). Moreover, "[a] reviewing court is entitled to have issues clearly defined with pertinent authority cited and a cohesive legal argument presented." Thrall Car Manufacturing Co. Lindquist, 145 Ill. App. 3d 712, 719 (1986). Accordingly, any issue not clearly defined and sufficiently presented is also deemed waived. Vincent v. Doebert, 183 Ill. App. 3d 1081, 1087 (1989). In the present case, plaintiff cites no relevant case law nor presents any reasoned analysis as to these 3 factors. Thus, we find that these issues are waived and that plaintiff is subject to taxation in Illinois.

Section 304(a) of the Illinois Income Tax Act (hereinafter the Act) provides that businesses that are not residents of Illinois but that derive business income from Illinois and one or more other States shall apportion such income to Illinois (35 ILCS 304(a) (West 1992)). Moreover, section 304(d) (1) of the Act specifically states that businesses are subject to taxation in Illinois if they derive income from furnishing transportation services in Illinois (see 35 ILCS 5/304(d) (1) (West 1992)). We agree with the circuit court that plaintiff is in the business of transporting goods. We find that, during the relevant tax period, when plaintiff picked up or delivered goods to or from locations within Illinois, it was deriving income from furnishing transportation services in Illinois and is, thus, subject to taxation in Illinois pursuant to section 304(d)(1).

Still to be addressed is the issue of whether or not plaintiff is subject to taxation in Illinois as a result of merely passing through Illinois with shipments that neither originate nor terminate within the State. In these situations, we find that plaintiff is not deriving Income from furnishing transportation services in Illinois and that such situations do not constitute a taxable event under section 304(d)(1). Moreover, we find that assessing a tax on plaintiff in such situations would, in fact, constitute an unfair burden on interstate commerce. Complete Auto Transit, 430 U.S. 274, 51 L. Ed. 2d 326, 97 S. Ct. 1076. As plaintiff points out, an out-of-state business that merely passes through Illinois, bears an unfair burden if it must pay income tax both in Illinois find in its home State. This Is because, business that do not travel through other States, or engage in interstate commerce, are taxed in only their home State. The circuit court, however, failed to recognize this point and did not distinguish between situations

that involve a pick-up and/or delivery and those that involve merely passing through the State.

In addition, it appears from the record that the formula used by the Department to compute plaintiff's tax liability compared plaintiff's total mileage to plaintiff's mileage in Illinois, again without taking into account the miles that were travelled when merely passing through the State. Instead, we find that the formula should have taken into account only those miles travelled in Illinois when making a pick-up and/or a delivery within the State as opposed to plaintiff's total miles travelled in Illinois. Accordingly, we affirm the portion of the circuit court's decision that holds plaintiff liable for Illinois income tax, pursuant to section 304(d)(1), for the portion of its services that involved either pick-ups and/or deliveries of goods within the State of Illinois. However, we reverse the circuit court's decision that plaintiff is subject to Illinois income tax for the portion of its services which involves merely passing through the State with shipments that neither originate nor terminate within Illinois. Furthermore, we direct the circuit court on remand to recompute the appropriate amount of tax that plaintiff owes consistent with the views contained herein.

Accordingly, the judgment of the circuit court of Cook County is affirmed in part and reversed in part and remanded with directions in accordance with Supreme Court Rule 23(b) (159 Ill. 2d R. 23(b)).

Affirmed In part and reversed in part and remanded with directions.

TULLY, J., with RIZZI, P.J., and GREIMAN, J., concurring.

ERIEVIEW CARTAGE, INC., Petitioner, v. COMMONWEALTH of Pennsylvania, Respondent (Six Cases)

No. 1749 C.D. 1985, No. 1750 C.D. 1985, No. 1751 C.D. 1985, No. 1752 C.D. 1985, No. 1753 C.D. 1985, No. 1754 C.D. 1985

Commonwealth Court of Pennsylvania

148 Pa. Commw. 1; 610 A.2d 1069; 1991 Pa. Commw. LEXIS 720

December 4, 1990, Argued

January 7, 1991, Decided

SUBSEQUENT HISTORY: [***I]

Publication Ordered June 22, 1992.

PRIOR HISTORY. APPEALED From No. R-8745. State Agency, Board of Finance and Revenue

DISPOSITION: Accordingly, we dismiss the appeals.

COUNSEL: Frederic M. Wilf and Gerry J. Elman, for petitioner.

Michael A. Roman, Eugene J. Anastasio and Bryan E. Barbin, for respondent.

JUDGES: Palladino and Kelley, JJ., and Crumlish, Jr., Senior Judge.

OPINION BY: PALLADINO

OPINION: [*21 [**1070] Erieview Cartage, Inc. (Erieview) appeals an order of the Board of Finance and Revenue (Board), which denied Erieview's six administrative appeals of six tax settlement reports issued by the Department of Revenue (Department) pursuant to Section 401(l) of the Act of March 4, 1971, P.L. 6, as amended, 72 P.S. § 7401(l).

Erieview, a Delaware corporation which provides transportation services, filed a Corporate Net Income Tax report and a Franchise Tax report with the Department for each of the taxable years 1980, 1981 and 1982. The Department issued six tax settlement reports, imposing taxes on Erieview for these years.

Erieview appealed the six reports to the Board, taking the position that it was not subject to taxation in Pennsylvania because it operated in Pennsylvania solely with equipment leased from independent owner-operators, [***2] who supplied trucks, drivers, fuel, insurance, and maintenance. Erieview also maintained it was not subject to the taxes because the transportation services provided in Pennsylvania were not intrastate. The Board denied the appeals. Erieview filed six appeals to this court, which we consolidated.

[*3] In support of its consolidated appeals, Erieview has filed one brief, the deficiencies of which we find necessary to address. Erieview's brief does not contain a statement of jurisdiction, order or determination in question, statement of questions involved, or summary of argument.

Pa. R. A. P. 2111 (a) states in pertinent part:

(a) General Rule. The brief of the appellant, except as otherwise proscribed by these rules, shall consist of the following matters, separately and distinctly entitled and in the following order:

(1) Statement of jurisdiction.

(2) Order or other determination in question.

(3) Statement of questions involved.

(4) Statement of the case.

(5) Summary of argument.

(6) Argument of appellant.

(7) A short conclusion stating the precise relief sought.

Erieview's brief does not conform to the mandatory requirements of rule 2111(a) and does not [***3] provide the necessary information for this court to perform a meaningful review.

Accordingly, we dismiss the appeals. N1

N1 See *Thomas v. APSCUF et al., 101 Pa. Commonwealth Ct.* 174, 485 A.2d 903 (1985)

[**1071] ORDER

AND NOW, January 7, 1991, the appeals of Erieview Cartage, Inc., in the above-captioned matters are dismissed.

ERIEVIEW CARTAGE, INC.,	:	IN THE
	:	COMMONWEALTH
Petitioner	:	COURT OF
	:	PENNSYLVANIA
v.	:	
	:	Nos. 1749, 1750,
	:	1751, 1752, 1753
	:	AND 1754 C.D. 1985
COMMONWEALTH	:	
OF PENNSYLVANIA	:	
	:	
Respondent	:	
	:	

BRIEF ON BEHALF OF PETITIONER, ERIEVIEW CARTAGE, INC.

MEMORANDUM OF LAW

INTRODUCTION

This case arises out of an attempt by the Pennsylvania Department of Revenue to collect an income tax from the Petitioner, Erieview Cartage, Inc. pursuant to Section 402 of the Pennsylvania Net Income Tax Act ("Act"). Erieview submits this memorandum in opposition to this assessment on three grounds. First, Petitioner contends that: (1) It does not conduct business in the Commonwealth; (2) it does not carry on activities in the Commonwealth; (3) it does not employ property or capital in the Commonwealth; and (4) it does not own property in the Commonwealth and, therefore, it is not subject to the Act. Second, that even if Erieview's activities are subject to the Act, the Act violates the Commerce

Clause of the United States Constitution, Article I, Section 8, in that it imposes an impermissible burden on activities conducted wholly in Interstate Commerce. Third, the tax on Erieview would violate the Due Process Clause of the United States Constitution, Amendment XIV in that there is an insufficient nexus to provide a basis for taxation.

FACTS

The facts in this case are stipulated. Essentially, those facts provide that Erieview conducts no activities, has no place of business and receives no income in the Commonwealth of Pennsylvania. Erieview's only connection with the Commonwealth is that, on occasion, certain independent contractors, using their own equipment, will fulfill a contractual obligation to Erieview by picking-up OR delivering a load of freight in the Commonwealth. In each case the freight origination or destination is outside the Commonwealth and the activity is exclusively regulated as interstate commerce.

ARGUMENT

I. The Act Does Not Provide For Taxation Under These Facts

The Act provides the four bases of tax liability described above. Based on the stipulated facts, bases one, three and four clearly do not apply. The only arguable basis for liability is the provision of the statute which states that tax shall apply to the privilege of carrying on "activities" in the Commonwealth.

II The Imposition Of A Tax Under These Facts Constitutes An Impermissible Tax On Foreign Commerce

This case is controlled by the decision of the Supreme Court of this Commonwealth in Roy Stone, supra. In that case the facts were even more compelling than the present case since Roy Stone's employee's actually drove Roy Stone owned equipment in Pennsylvania. In contrast, neither Erieview's vehicles nor its employees were ever in Pennsylvania.

The Pennsylvania Supreme Court reviewed the history of the law's development on the prohibition of the tax on activities in interstate commerce and concluded that notwithstanding all the exceptions, to find a tax in that situation permissible would be to obviate the interstate commerce clause altogether:

> If the Commonwealth can levy this tax on this appellant, which has no tangible or intangible property in Pennsylvania, no office in Pennsylvania, no wages or payroll in Pennsylvania, no employees doing any kind of work in Pennsylvania except d-iving its trucks in interstate commerce, and which makes no contracts and receives no orders in Pennsylvania, it is almost impossible to envision what is left of and what is encompassed by the term "interstate commerce" which a State is prohibited from taxing. If, as the Commonwealth contends, this Act does not tax interstate commerce, can there be, in this particular field, any

such thing as interstate commerce which is free from State taxation?

Roy Stone, supra. Lexis p 8.

III There Is Insufficient Nexus Between Erieview And The Commonwealth To Provide A Basis Of Taxation Under The Due Process Clause.

The pivotal case in the determination of nexus by the United States Supreme Court is Complete Auto Transit, Inc. v. Brady. 430 U.S. 274 (1977). In that case as in others with which we are aware, see also American Refrigerator Transit Co. v. Comm. 395 P. 2d 127 (1964), the courts have relied on the existence of property in the state as an essential element in permitting the tax. Although we doubt that the mere existence of property owned by the party to be taxed is enough to permit taxation, see Japan Lines Ltd. vs. County of Los Angeles, 441 US 434 (1979), the nonexistence of anything owned by the party in the state certainly can not create sufficient nexus.

If nexus can be created by the mere fulfillment of a contractual obligation by a third party in another state, then it is difficult to imagine realistic limits to a state's right to tax. In our present economy where movements across state lines, in fact movements pursuant to contract across international boundaries, are the order of the day, no one would be immune from multiple state taxation.

CONCLUSION

For the foregoing reasons this Court should hold that the taxation of Erieview Cartage is

unauthorized and unconstitutional, and order the tax refunded plus appropriate interest.

Respectfully submitted,

s/_____

Lawrence A. Salibra, II
1301 East Ninth Street, 29th Floor
Cleveland, Ohio 44114
(216) 523-6919
Attorney for Petitioner,
Erieview Cartage, Inc.

Pa. Code 72 P.S. §7402 (1971) provides:

§7402. Imposition of Tax

Every corporation shall be subject to,. And shall pay for the privilege of (i) doing business in this Commonwealth; or (ii) carrying on activities in this Commonwealth; (iii) having capital or property employed or used in this Commonwealth; or (iv) owning property in this Commonwealth, by or in the name of joint-stock association, or corporation.....

Pa. Code 72 P.S. §7401 (1971) provides:

(3). **Taxable Income**

2.(B)(1) All business income or railroad, truck, bus or airlines companies shall be apportioned to this Commonwealth by multiplying the income by a fraction, the numerator of which is the taxpayer's total revenue miles within this Commonwealth during the tax period and the denominator of which is the total revenue miles of the taxpayer everywhere during the tax period. For purposes of this paragraph revenue miles shall mean the average receipts derived from the transportation by the taxpayer of persons or property one mile. Where the revenue miles are derived from the transportation of both persons and property, the revenue mile fractions attributable to each such class of transportation shall be computed separately, and the average of the two fractions weighted in accordance with the ratio of total receipts from each such class of transportation everywhere to total receipts from both such classes of transportation everywhere, shall be used in apportioning income to this Commonwealth.